INDEX

760-044—65——1

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL, APPELLANT

v.

DEAN RUSK, SECRETARY OF STATE, AND
ROBERT F. KENNEDY, ATTORNEY GENERAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the district court (R. 32–67) is reported at 228 F. Supp. 65.

JURISDICTION

The judgment of the district court was entered on March 2, 1964 (R. 67), and a notice of appeal was filed on March 17, 1964 (R. 68–69). This Court on October 12, 1964, postponed consideration of the question of jurisdiction until the hearing on the merits (R. 70). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the relief requested by appellant required the convening of a three-judge court under 28 U.S.C. 2282.

2. Whether the Secretary of State is authorized to restrict the travel of United States citizens to Cuba by refusing to issue passports valid for that country.

3. Whether the restriction invades any constitutional right of the appellant.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The statutes, proclamations, executive orders, and regulations involved are set out in the Appendix, *infra*, pp. 79–91.

STATEMENT

Prior to 1961, no passport was required for travel in the Western Hemisphere including Cuba. 22 Fed. Reg. 10836. On January 3, 1961, the United States broke diplomatic and consular relations with Cuba. On January 16, 1961, the Department of State eliminated Cuba from the area for which passports were not required (22 C.F.R. 53.3 (b)) and issued Public Notice 179, which declared all outstanding United States passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State" (26 Fed. Reg. 492; R. 21). A companion press release (Press Release No. 24) stated that the Department of State contemplated granting exceptions to these travel restrictions for "persons whose travel may be regarded as being in the best interests of the United States, such as news-

men or businessmen with previously established business interests" (R. 22).

Appellant, a citizen of the United States and holder of a valid passport, applied to the Secretary of State on March 31, 1962, to have his passport validated for travel to Cuba as a tourist (R. 23). The request was denied (R. 23). On October 30, 1962, appellant renewed his request, stating that the "purpose of my trip would be to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen" (R. 30). The renewed request also was denied on the ground that the purpose of appellant's trip did not meet the standards prescribed for such travel in Press Release No. 24 (R. 31).

On December 7, 1962, appellant instituted this action in the United States District Court for the District of Connecticut. In his original and amended (R. 1–6) complaints, he alleged that the Secretary of State's regulation restricting travel to Cuba was unauthorized by statute and deprived appellant of constitutional rights under the First, Fifth, Ninth, and Tenth Amendments of the United States Constitution. The prayer for relief sought a judgment declaring: (1) that appellant was constitutionally entitled to travel to Cuba; (2) that appellant's travel to Cuba would not violate any statutes, regulations, or passport restrictions; (3) that the Secretary of State's regulation restricting travel to Cuba was invalid; (4) that the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 were unconstitutional; (5) that the Secretary of State's refusal

to grant appellant a passport valid for travel to Cuba violated appellant's constitutional rights and rights granted by the United Nations Declaration of Human Rights; and (6) that denial of the passport endorsement without a formal hearing violated appellant's rights under the Fifth Amendment.[1] The complaint also requested that the Secretary of State be directed to validate appellant's passport for travel to Cuba and that the appellees be enjoined from interfering with such travel. In the amended complaint, appellant added to the paragraph which sought a declaration of unconstitutionality regarding the Passport Act of 1926 and Section 215 of the Immigration and Nationality Act of 1952 a prayer that the appellees be enjoined "from carrying out or enforcing the said statutes, as aforesaid" (R. 5).

On appellant's motion (R. 11), and over the objection of the appellees, a three-judge court was convened. On cross motions for summary judgment, the court, by a divided vote, granted the Secretary of State's motion for summary judgment and dismissed the action against the Attorney General "on the merits" (R. 32–46, 68). One of the members of the three-judge panel, District Judge Blumenfeld, was of the view that the case was not one for a three-judge court because, as he said, "We are not being asked to test the statute against the Constitution; we are being asked to test the departmental regulations" (R. 60). On the merits, Judges Clarie and Blumenfeld sustained the regulation. Circuit Judge Smith concurred with

[1] This procedural claim was abandoned in the district court and has not been urged here.

Judge Clarie's conclusion that the case was one for a three-judge court but dissented on the merits. His ground was "that the present statutes do not authorize area restrictions on travel and that the Executive cannot restrict the right to travel without specific statutory authority" (R. 57).

SUMMARY OF ARGUMENT

I

The Court has no jurisdiction to determine, on the merits, the questions presented by this appeal.

Direct appeal is permissible only where a district court of three judges is required under 28 U.S.C. 2282 because the plaintiff seeks an "injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution." Congress deliberately excluded from Section 2282 suits seeking to enjoin as unconstitutional discretionary regulations issued by an executive official or administrative agency.

The present case falls within the excluded category. The thrust of the complaint is levelled at the directive of the Secretary of State interdicting general travel to Cuba. That appellant's quarrel is with the directive, which was discretionary, is demonstrated by the facts: (1) that appellant would have no cause for complaint if the order had not been issued and the passport withheld and (2) that appellant would secure complete relief if the operation and enforcement of the order were enjoined. The statute neither interdicts travel to Cuba nor directs its interdiction.

The case is governed, therefore, by *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171. That appeal was dismissed because (1) the broad challenge to the Federal Alcohol Administration Act upon the ground that only the States could constitutionally regulate commerce in intoxicating liquor raised no substantial constitutional question; and (2) the Court had no jurisdiction to consider upon direct appeal the plaintiffs' further contention that the regulations issued under the statute, and the statute to the extent that it authorized the regulations, should be invalidated as infringements of the plaintiffs' constitutional rights. Similarly, in the present case there is no substantial attack upon the general legislative enactments and no jurisdiction to consider the attack upon the constitutionality of the executive regulation. Nothing is added by a more explicit request for an injunction barring the operation of a statute to the extent that it authorizes the order alleged to invade the plaintiff's constitutional rights.

II

The order of the Secretary of State restricting travel to Cuba by refusing the issuance of passports valid in that area, without which the travel is forbidden by statute, is a duly authorized and constitutional instrument of foreign policy.

Appellant's challenge to the area restriction presents the legal questions (1) whether the Secretary has power to bar the issuance of passports valid for travel to Cuba where the effect of the denial is to

make the travel a crime and (2) whether the restriction invades any of his constitutional rights. In examining those questions, however, the essential nature of the Secretary's order—the true function of the restriction—must be fully understood.

A. This is not a case like *Kent* v. *Dulles*, 357 U.S. 116, where the Secretary withheld passports from a particular class of citizens because of the nature of their beliefs or associations, and thus barred them from leaving the United States. The order attacked in this case exercises the conventional foreign policy function of suspending travel by the citizens of one country to the realm of another as an instrument of the conduct of foreign relations. The nature of the Castro regime in Cuba and the difficulties between the Castro government and the United States are too well-known to require elaboration. Under existing conditions the refusal to issue passports for Cuba and the consequent restriction of travel serve two vital purposes:

First, travel by U.S. citizens to Cuba in this period of tension could easily result in incidents of the most serious import. In the early days of the Castro regime U.S. citizens were subjected to harassment, arrested without charges, and even put to death. Under present conditions there is no possibility of limiting the risk of such incidents or of dealing with their consequences by normal diplomatic channels. A disastrous international chain of events might all too quickly result from the recurrence of such incidents, even though the U.S. citizens involved had been

informed by the State Department that they entered Cuba at their own risk.

Second, and much more important, the restriction is an essential part of an international program for preventing the Castro regime in Cuba from infiltrating and subverting existing governments in the Western Hemisphere. Travel between Cuba and these nations is important to the active attempts at infiltration and subversion. The United States and other members of the Organization of American States have coordinated their policies and undertaken cooperative measures to prevent unrestricted travel between Cuba and the other American Republics. Were the United States to withdraw from this collective effort, it is doubtful that the present inter-American restrictions on travel could be maintained. If those restrictions were to be relaxed, the opportunities available to the Cuban Government for infiltration and subversion would be greatly increased.

B. The Secretary of State has ample power to limit the areas for which passports will be valid when the necessities of foreign policy so require, even though the limitation operates by express congressional enactment as a restriction upon travel to excluded areas.

The issuance or refusal of passports according to the necessities of international conditions is an integral part of the Executive's inherent responsibility for foreign relations. In international law and diplomacy the suspension of travel to a foreign country is a recognized instrument of foreign policy. But while the constitutional authority of the President is

a sufficient source of the passport power, we need not rely upon it alone because the Passport Act of 1926 in unequivocal words delegates to the President and Secretary a general discretionary power over passports, which is most naturally read to include the definition of the areas for which passports shall be issued and those for which, because of the necessities of foreign policy, passports will be withheld. Since the 1926 Act operates in conjunction with the broad and inherent powers of the Executive over foreign affairs, there is no need to distinguish exactly between the statutory and constitutional sources. When Congress enacted the legislation confirming to the President and Secretary broad control over the issuance of passports, it must have contemplated that the authority would, when necessary, be used to suspend the issuance of passports for travel to another country when required by the state of international relations.

It is irrelevant whether the refusal of a passport valid for a specified area would, at all times, have made travel to the area illegal. That was the consequence during our participation in World War I and again from May 27, 1941, until today. As a practical matter the refusal of a valid passport would always operate, save in rare cases, to interdict the travel, and Congress must have appreciated and intended that consequence. In any event, the important point, at this stage of the argument, is that the President and Secretary of State have always had, by the virtue of their inherent power and the Passport Act of 1926 and its predecessors, full authority to limit the areas

760-044—65——2

for which passports will be issued according to the necessities of our international relations.

Executive practice and the repeated reenactment of earlier legislation indistinguishable from the Passport Act of 1926 confirm our proposition. In practice the President and Secretary, from the Civil War until today, have repeatedly used the authority conferred by the Act of 1926 and its predecessors to interdict travel to specific areas and under various circumstances as part of their conduct of foreign relations. That consistent interpretation would alone be entitled to great weight. Here any possible doubt is allayed by the repeated reenactment of essentially the same statute after the gloss of practice had been impressed upon its words.

All this was before Congress when it declared in Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), that, under certain conditions proclaimed by the President, it should be "unlawful for any citizen of the United States to depart from or enter * * * the United States unless he bears a valid passport." Manifestly, the additional provision was not intended to curtail the existing discretion of the Executive to limit the areas for which passports would be valid, or to refuse passports intended only for travel to the excluded areas, when such travel by U.S. citizens would be inconsistent with pressing international considerations. A similar provision had been in force during and after World War I and from 1941 until 1952. The Act of 1952 took the authority of the Executive over passports as it found it, includ-

ing the power to impose area restrictions, and put behind any passport limitations thus imposed by the Executive the sanction of a legislative prohibition upon travel in violation thereof. Not a word in the 1952 legislation limits the broad control over the issuance and terms of passports previously enjoyed by the Executive under the Passport Act of 1926 and the inherent power over foreign affairs, even though additional legal consequences were made to flow from the Secretary's determinations. Section 215(b) of the 1952 Act, operating in conjunction with the broad and established authority over passports, therefore confirms to the President and Secretary the power to suspend travel to specified areas in times of emergency as the necessities of international relations may require.

Section 215 does not confront the Executive with the bare alternative of either interdicting departure from the United States or allowing travel to any country. "If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power." *MacEwan* v. *Rusk,* 228 F. Supp. 306, 310 (E.D. Pa.), pending upon appeal to the Third Circuit. Such has been the interpretation of every court to consider the question.

Kent v. *Dulles,* 357 U.S. 116, is not to the contrary. The refusal to permit any citizen to leave the United States without inquiry into his beliefs and associations, and the denial of the passport necessary to departure if he holds a particular class of views, is ut-

terly unlike a general restriction upon travel by all U.S. citizens to a few specific areas even though narrow exceptions are permitted. Not only does the discrimination against particular associations and beliefs, present in one case and absent from the other, afford an obvious ground of distinction, but the discriminatory interdiction voided in *Kent* had little, if any, relation to foreign policy, whereas the present area restriction serves a vital function in inter-American Affairs. The holding of *Kent* that the Secretary lacks authority to grant or withhold passports at his discretion will not support the conclusion that he may not limit the areas in which a passport is valid as an instrument of foreign policy, as he has done periodically for many years.

III

The restriction upon travel to Cuba, which serves vital national interests in the conduct of foreign policy, invades no constitutional right secured by the First or Fifth Amendment. Freedom of movement, including travel to foreign nations, is most assuredly part of the "liberty" guaranteed by the Fifth Amendment but that liberty is not absolute; it may be reasonably circumscribed if required by other, pressing national interests. A Nation which can conscript citizens for military training and service when international relations so require, cannot be powerless to forbid citizens to travel in particular regions in a similar time of national emergency.

Here the challenged restriction covers a very limited area—Cuba. It is applicable, with narrow exceptions, to all U.S. citizens. It involves no inquiry into beliefs, associations, or even activities; and it raises no danger of invidious discrimination. It is

maintained in cooperation with other American republics as an essential measure for reducing the clear and present danger of subversive attacks by the Castro regime upon Latin American countries and perhaps ultimately upon the United States. The urgency of such cooperation in prophylactic measures short of war is evidenced by the fact that the United States and the Castro regime, backed by the Soviet Union, have already stood, at least once, in the most dangerous confrontation.

Appellant's claims that the legislation authorizing the passport restrictions is unconstitutionally vague and constitutes an unconstitutional delegation of legislative power are without merit.

ARGUMENT

I

THE CASE SHOULD BE REMANDED FOR WANT OF JURISDICTION

A direct appeal to this Court from a district court lies under 28 U.S.C. 1253 only "from an order granting or denying * * * an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges." This Court has no jurisdiction of the present appeal unless the complaint was required to be heard by a three-judge court. *Oklahoma Gas and Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386; *Phillips* v. *United States*, 312 U.S. 246; *Prendergast* v. *United States*, 314 U.S. 574. We submit that a three-judge court was not required and that the Court therefore has no jurisdiction. The proper course, under our view,

would be to remand the cause to the district court for a new judgment which would allow appellant to appeal to the court of appeals. *Rorick* v. *Board of Commissioners,* 307 U.S. 208, 213; *International Ladies' Garment Workers Union* v. *Donnelly,* 304 U.S. 243, 251–252.

Section 2282 of Title 28 of the United States Code requires impanelling a three-judge court in any case in which the relief sought is "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States * * *." There is a sharp distinction between enjoining the operation of a statute, which requires a three-judge court, and enjoining as unconstitutional the discretionary action of an administrative body or executive officer, for which only a single judge is required. The distinction is made by the very language of Section 2282, for it speaks only of restraining the "operation or execution of any Act of Congress." Where the statute directs the action of the executive or administrative officer, restraint upon his action may be restraint upon operation of the statute itself but that is plainly not the case where, as here, the statute delegates a general authority and the complaint is of a specific executive or administrative order issued pursuant thereto. *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171; *Phillips* v. *United States,* 312 U.S. 246.

Nor can it be supposed that the exclusion of cases seeking to enjoin administrative action from the scope of Section 2282 was unintentional. At one time Sec-

tion 2281, its analogue applicable to State action, was confined to injunctions against the enforcement "of any statute of a State," but by the Act of March 4, 1913, 37 Stat. 1013, Congress added suits to restrain the enforcement "of an order made by an administrative board or commission acting under and pursuant to the statutes of such State." Since Section 2282 was enacted by Congress in 1937 with this language and history before it, the omission of any requirement of a three-judge court in an action to restrain enforcement of an order of a federal officer or agency acting under and pursuant to a federal statute must have been deliberate. See *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171, 173; *Coffman* v. *Breeze Corporations,* 323 U.S. 316, 317–318, note 1.

It follows that the court below plainly erred in holding that a three-judge court is required wherever the injunction would paralyze "the operation of an entire administrative system" (R. 36). Nor is the importance of the administrative action the test. Congress might have taken those elements into account as apparently it did in Section 2281; it chose, however, to allow single judges to rule upon requests for injunctions to stay the rules or orders issued by federal executive or administrative officials.

It seems equally plain that appellant's complaint seeks only to enjoin executive action and not the enforcement, operation, or execution of an Act of Congress, within the meaning of Section 2282. His request for an injunction restraining the Secretary of State and Attorney General "from carrying out or enforcing" the Passport Act of 1926 and Section 215

of the Immigration and Nationality Act of 1952 does, in form, seek to enjoin the operation of two acts of Congress, but when one looks below the surface, it becomes apparent that the substance of the relief sought is necessarily confined to the operation of the Secretary's directives restricting travel to Cuba. Appellant complains only of the refusal to permit him to travel to Cuba. He is not concerned with travel to other places, with other restrictions upon travel, or with other aspects of the administration of the statutes. Indeed, he would have no standing to challenge them upon the allegations of this complaint.

The restriction upon travel to Cuba is imposed not by any Act of Congress but by the directives issued by the Secretary of State in the exercise of his discretion. Nothing on the face of either statute interdicts travel to Cuba. Nothing in either statute requires or directs the Secretary to interdict such travel. If appellant's constitutional rights have been infringed, it is by the discretionary action of the Secretary, and appellant can be given complete relief by declaring the invalidity of the Secretary's order and enjoining all action under it without reference to the statute. The statutes are only remotely involved—only to the extent that the Secretary assigns either or both as the source of authority for his discretionary action.

William Jameson & Co. v. *Morgenthau*, 307 U.S. 171, makes it plain that a three-judge court is not required under these circumstances and that this Court has no jurisdiction of the appeal. There the appellants brought an action described in their Statement as to Jurisdiction as "a suit seeking to enjoin

the defendants, temporarily and permanently, from enforcing the provisions of the Federal Alcohol Administration Act and particularly sections 21(k) and 46(a) of Regulations No. 5 issued under the Act on the grounds that (1) the regulations in question are repugnant to the Constitution of the United States and (2) the Federal Alcohol Administration Act is repugnant to the Constitution of the United States" (Jurisdictional Statement in No. 717, October Term 1938, p. 8). The statute was attacked upon the ground that the Twenty-first Amendment vests control over traffic in intoxicating liquors exclusively in the States. The regulations were attacked as unauthorized by the statute and also upon constitutional grounds as delegating power to the British government, as going beyond the commerce power, and as introducing arbitrary classifications. *Id.*, pp. 8–9. The Court held that the general attack upon the entire statute was insubstantial. It refused to rule upon the constitutional and statutory challenges to the regulations because it was not the intention of Congress to allow a direct appeal to this Court "when administrative action and not the Act of Congress is assailed" (307 U.S. at 173–174).

Appellant attempts to brush the *Jameson* decision aside upon the ground that there "no substantial question of constitutional validity was raised" (Appellant's Brief, p. 18), whereas here the constitutional issue is substantial. The Court's finding of insubstantiality, however, applied only to the argument that the federal government had no power to regulate interstate and foreign commerce in intoxicating

liquors. It made no such ruling with respect to the constitutional challenges to the regulations because it held that an attempt to enjoin the enforcement of administrative regulations does not require convening a three-judge court.

Nor can the *Jameson* case be distinguished upon the ground that the plaintiffs in that case challenged only the constitutionality of the regulations whereas the present appellant asserts that if either the Passport Act or Immigration and Nationality Act authorizes the executive restriction upon travel to Cuba, it is unconstitutional. Examination of the complaint in the *Jameson* case makes it plain that, after attacking the regulations upon both statutory and constitutional grounds, the plaintiffs alleged that, if and insofar as the statute were construed to authorize the regulations, the statute was unconstitutional as a wrongful delegation of legislative power and a deprivation of property without due process of law (Record in No. 717, October Term 1938, pp. 16–17).[2]

---

[2] Although appellant attacks the statutes directly on the ground that they are unconstitutionally vague and constitute an unconstitutional delegation of federal power, it is only the Secretary of State's administrative action, not the statutes, which has affected appellant. The statutes did not require the Secretary to restrict travel to Cuba and, if he had not done so, appellant would not have been affected by the statute in any way. Consequently, an injunction against the Secretary's administrative action would fully protect appellant.

In any event, appellant's contentions concerning vagueness and delegation of power are frivolous (see pp. 74–77 below). It is well established that a three-judge court must be convened only if there is a substantial question raised concerning the constitutionality of the statute sought to be enjoined. *E.g.*, *Schneider v. Rusk*, 372 U.S. 224; *William Jameson & Co. v. Morgenthau*, 307 U.S. 171.

To make the requirement of a three-judge court turn upon the presence or absence of such an allegation would wipe out the considered legislative distinction between enjoining the operation of a federal statute and enjoining the operation of an order made pursuant to a federal statute. Wherever an order is attacked as unauthorized by statute and also as a deprivation of constitutional rights, the plaintiff can allege that to the extent that the statute authorizes the order, the statute is unconstitutional and its enforcement should be enjoined.[3] To allow a direct appeal to this Court in every case, regardless of whether the allegation was included, would read into the statute some phrase such as "or order made by executive or administrative authority acting under an Act of Congress," which Congress omitted despite the example of Section 2281. Appellant contends that a plaintiff may obtain an injunction against an execu-

[3] The Court noted the above point in *Phillips* v. *United States*, 312 U.S. 246, 252, saying "Some constitutional or statutory provision is the ultimate source of all actions by state officials," and the opinion went on to hold that "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority."

Similarly, in *Ex Parte Bransford*, 310 U.S. 354, 359, the Court noted the essential difference between conduct by executive officials under a statutory directive—a challenge to which is a challenge to the statute—and the exercise of power under a statute conferring discretion. Speaking of tax valuations alleged to be discriminatory or confiscatory in violation of the Fourteenth Amendment, the Court said—

> Such assessments, if made and if invalid, are so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself.

Accordingly, a three-judge court was not required.

tive or administrative directive from a single judge upon constitutional grounds when he chooses *not* to allege that, if the statute authorizes the action, the statute is to that extent unconstitutional, as in *Kent* v. *Dulles*, 357 U.S. 116; but that the plaintiff is entitled to a three-judge court whenever, as here, he chooses to include that recital. This would mock congressional policy by allowing the plaintiff to turn Section 2282 on and off at will without regard to either the real nature of the relief sought or the substance of the issues.

Our interpretation conforms to the sense of Section 2282 and the requirements of sound judicial administration. The predicate of Section 2282 is the belief that a single judge should not have power to frustrate by injunction the operation of an enactment approved by the legislative branch in the exercise of its constitutional function. But where the only relief sought is against a particular exercise of executive or administrative power under a general delegation of authority, the court is not frustrating by injunction the operation of a regulatory scheme approved by the legislature and there is no collision between the congressional determination and the judicial decree. The present case is a perfect illustration. Congress did not interdict travel to Cuba or even decide whether, under existing circumstances, such travel should be interdicted. And except for any effect it might have under the doctrine of *stare decisis* the maximum result of appellant's suit can be to enjoin as unconstitutional the enforcement or operation of the order of the Secretary banning travel to Cuba under pres-

ent circumstances, leaving the statutes otherwise untouched.[4]

II

THE ORDER OF THE SECRETARY OF STATE RESTRICTING THE ISSUANCE OF PASSPORTS TO CUBA IS A DULY AUTHORIZED AND CONSTITUTIONAL INSTRUMENT OF FOREIGN POLICY

A. THE RESTRICTIONS UPON TRAVEL TO CUBA IMPOSED UNDER THE ORDER OF THE SECRETARY ARE VITAL INSTRUMENTS OF THE FOREIGN POLICY OF THE UNITED STATES

Appellant's challenge to the restriction upon travel to Cuba resulting from the Secretary of State's refusal to issue a passport for that area presents two legal

---

[4] The conclusion that a three-judge court was not proper is supported by the practice in passport cases involving the discretionary power of the Executive. *Kent* v. *Dulles*, 357 U.S. 116; *Dayton* v. *Dulles*, 357 U.S. 144; *Frank* v. *Herter*, 269 F. 2d 245 (C.A. D.C.); *Worthy* v. *Herter*, 270 F. 2d 905 (C.A. D.C.); *Briehl* v. *Dulles*, 248 F. 2d 561 (C.A. D.C.); *Boudin* v. *Dulles*, 235 F. 2d 532 (C.A. D.C.); *Robeson* v. *Dulles*, 235 F. 2d 810 (C.A. D.C.); *MacEwan* v. *Rusk*, 228 F. Supp. 306 (E.D. Pa.), pending on appeal to the Third Circuit; *contra*, *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D.C.). See also *Brown* v. *Roofers & Waterproofers Union*, 86 F. Supp. 50, 56 (N.D. Calif.), and *Parker* v. *Lester*, 98 F. Supp. 300, 307 (N.D. Calif.), appeal dismissed, 191 F. 2d 1020 (C.A. 9), involving challenges to other administrative actions, in which a one-judge court was held to be proper.

Cases involving the constitutionality of Section 6 of the Subversive Activities Control Act are not in point since there the statute itself prohibited the Secretary of State from issuing passports to members of Communist-action organizations. Since in those cases, the plaintiff was seeking to enjoin the statute and not administrative regulations or practice, three-judge courts were properly convened. *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Mayer* v. *Rusk*, 224 F. Supp. 929 (D.D.C.), vacated and remanded, 378 U.S. 579; *Copeland* v. *Secretary of State*, 226 F. Supp. 20 (S.D. N.Y.), vacated and remanded, 378 U.S. 588.

questions: (1) whether the Secretary has power to bar the issuance of passports valid for travel to Cuba when the effect of the denial is to make the travel a crime and (2) whether the restriction invades any constitutional right. In examining those questions, however, the essential nature of the Secretary's order—the true function of the restriction—must be fully understood.

This is not a case like *Kent* v. *Dulles*, 357 U.S. 116, where the Secretary withheld passports from a particular class of citizens because of the nature of their beliefs or associations, and thus barred them from leaving the United States. That practice had at best a remote relationship to foreign policy for it was aimed, not at intercourse with a particular country because of the state of international relations, but at a small class of American citizens regardless of international conditions or the country to which they wished to travel. Here, the withholding of passports for travel to Cuba and consequent prohibition upon travel to that island not only results from conditions in that country and the state of relations between Cuba and the United States but it is also an integral and vital part of a foreign policy towards Cuba worked out in conjunction with other American Republics.

1. The Cuban threat to the security of American Republics

The Communist government of Cuba raises a serious threat to the security of American States. *First*, while Communist Cuba does not now endanger

the United States militarily, it has imperiled our national security in the recent past and could conceivably do so in the future. One need only recall that the most dangerous moments of the post-war nuclear age were brought about by the emplacement of Soviet missiles in Cuba.

Second, Cuba is the only area in the Western Hemisphere controlled by a Communist government. If Communism's efforts there should be successful, other nations not only in Latin America but elsewhere may be tempted to follow its example.

Third, Cuba is actively attempting to overthrow the existing governments of the American Republics and to impose Communist rule upon those nations. It is attempting to interfere with the cooperative efforts of the United States and the other American nations, through the Alliance for Progress and otherwise, to build stable, democratic societies, and to bring about a far-reaching economic and social transformation. As the Department of State said a few years ago, the success of Cuba's policy of subversion would destroy "the authentic and autonomous revolutions of the Americas [and] * * * the whole hope of spreading political liberty, economic development, and social progress through all the republics of the Hemisphere." *Cuba,* Dep't of State Pub. No. 7171, p. 2 (1961).

There is ample evidence demonstrating the threat which Communist Cuba poses to the security of democracy in the Western Hemisphere. The official "White Paper," published by the Department of

State in April 1961, shortly after area restrictions were imposed, described the threat in these terms (*id.* at 25–28):

> Under Castro, Cuba has already become a base and staging area for revolutionary activity throughout the continent. In prosecuting the war against the hemisphere, Cuban embassies in Latin American countries work in close collaboration with Iron Curtain diplomatic missions and with the Soviet intelligence services. In addition, Cuban expressions of fealty to the Communist world have provided the Soviet Government a long-sought pretext for threats of direct interventions of its own in the Western Hemisphere. * * *
>
> As Dr. Castro's alliance with international communism has grown close, his determination to export revolution to other American Republics—a determination now affirmed, now denied—has become more fervent. * * *
>
> Cuban interventionism has taken a variety of forms. During 1959 the Castro government aided or supported armed invasions of Panama, Nicaragua, the Dominican Republic, and Haiti. These projects all failed and all invited action by the Organization of American States. In consequence, after 1959 the Castro regime began increasingly to resort to indirect methods. The present strategy of Fidelismo is to provoke revolutionary situations in other republics through indoctrination of selected individuals from other countries, through assistance to revolutionary exiles, through incitement to mass agitation, and through the political and propaganda operations of Cuban

embassies. Cuban diplomats have encouraged local opposition groups, harangued political rallies, distributed inflamatory propaganda, and indulged in a multitude of political assignments beyond the usual call of diplomatic duty. Papers seized in a raid on the Cuban Embassy in Lima in November 1960 display, for example, the extent and variety of clandestine *Fidelista* activities within Peru. Documents made public by the Government of El Salvador on March 12, 1961, appear to establish that large sums of money have been coming into El Salvador through the Cuban Embassy for the purpose of financing pro-Communist student groups plotting the overthrow of the government. The regime is now completing construction of a 100,000-watt radio transmitter to facilitate its propaganda assault on the hemisphere.

Most instances of serious civil disturbance in Latin America in recent months exhibit Cuban influence, if not direct intervention. At the time of the November riots in Venezuela, the government announced the discovery of high-powered transmitting and receiving sets in the possession of Cubans in Caracas. In the following weeks about 50 Cubans were expelled from the country. Similar patterns appear to have existed in troubles in El Salvador, Nicaragua, Panama, Colombia, Bolivia, and Paraguay.

Other American governments, acting through the organs of the inter-American system, have increasingly voiced their concern over Soviet intervention and Cuban subversion. As early as August 1960, the For-

760-044—65——3

eign Ministers of the American Republics, meeting at San Jose, Costa Rica, declared that the acceptance by an American government of extra-continental intervention "endangers American solidarity and security." The Declaration of San Jose, Costa Rica, Seventh Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. C/II.7 (1960).

In January 1962, the Inter-American Peace Committee reported that Cuba's connections with the Sino-Soviet bloc were incompatible with inter-American treaties, principles, and standards. Report of the Inter-American Peace Committee, OEA/Ser. L/III, pp. 45–48 (1962). At the end of that month, the Foreign Ministers of the American Republics, meeting in Punta del Este, Uruguay, declared "that the Continental unity and the democratic institutions of the hemisphere are now in danger." Resolution I, Eighth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. C/II.8 (1962). Resolution I of the Punta del Este meeting read (*ibid.*):

> The Ministers have been able to verify that the subversive offensive of communist governments, their agents and the organizations which they control, has increased in intensity. The purpose of this offensive is the destruction of democratic institutions and the establishment of totalitarian dictatorships at the service of extracontinental powers.

In October 1962, two weeks before the crisis involving Soviet missiles in Cuba, the Foreign Ministers of the American Republics, meeting informally in Washington agreed that the most urgent problem of the

Western Hemisphere was Communist intervention in Cuba for the purpose of converting the island into an armed base for hemispheric penetration and subversion. 47 Dep't of State Bull. 599 (1962).

More recently, a special investigating committee of the Organization of American States verified that Cuba had made a large shipment of arms to Venezuelan insurgents in November 1963. The committee found that Cuba "openly intended to subvert Venezuelan institutions and to overthrow the democratic government of Venezuela through terrorism, sabotage, assault, and guerrilla warfare." Report of the Investigating Committee appointed by the Council of the OAS, OEA/Ser. G./IV (1964). The Foreign Ministers of the American Republics, meeting in Washington in July 1964, condemned "emphatically" the present Government of Cuba "for its acts of aggression and of intervention against the territorial inviolability, the sovereignty, and the political independence of Venezuela." Resolution I, Ninth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. F./II. 9 (1964).

2. American policy towards the threat of infiltration and subversion of American Republics

Faced with this threat, the United States has responded in a careful and deliberate manner. The goal has been to isolate Cuba and thus weaken its ability and will to promote subversion.

As early as July 1960, President Eisenhower ordered a cut of 17,000 tons in Cuba's sugar quota. 25 Fed. Reg. 6414. In October 1960, the United

States prohibited exports to Cuba except for non-subsidized food-stuffs, medicine, and medical supplies. Two months later, the Cuban sugar quota was eliminated completely.

Diplomatic and consular relations with Cuba were terminated on January 3, 1961. Thirteen days later, the restrictions on travel to Cuba were imposed by the Secretary of State. 26 Fed. Reg. 492. In September 1961, the United States prohibited assistance to any country which assisted Cuba unless the President determined that American assistance would be in the national interest. A complete embargo on trade with Cuba was imposed in February 1962 (Pres. Proc. No. 3447, 27 Fed. Reg. 1085), and a month later the United States prohibited imports of merchandise made or derived in whole or in part from products of Cuban origin (27 Fed. Reg. 2765).

In May 1962, the United States denied bunkering facilities in United States ports to all vessels under charter to the Sino-Soviet bloc which were engaged in trade with Cuba, and in the same month the United States prohibited returning tourists from bringing in products of Cuban origin. The Foreign Aid and Related Agencies Appropriation Act of 1963 prohibited aid to any country which furnished or permitted its ships to carry to Cuba arms, ammunition, implements of war, petroleum, transportation materials, or other materials of strategic value. 76 Stat. 1163, 1165. A similar prohibition was placed on aid to any country which furnished or permitted its ships to carry items of economic assistance to Cuba, unless the President

determined that withholding United States aid would be contrary to the national interest. 76 Stat. 1163, 1165 And in July 1963, the United States issued assets control regulations blocking all Cuban assets in this country. 28 Fed. Reg. 6974.

On October 3, 1962, Congress passed a joint resolution stating that the United States is determined (76 Stat. 697):

> to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere; [and]
>
> * * * * * *
>
> to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination.

President Johnson reiterated United States policy towards Cuba in April 1964: "Our first task must be, as it has been, to isolate Cuba from the inter-American system, to frustrate its efforts to destroy free governments, and to expose the weakness of communism so that all can see. That policy is in effect and that policy is working. * * * [I]t has lessened opportunities for subversion * * *." Speech at Associated Press Luncheon in New York, April 20, 1964.

The United States has not been alone in taking action to isolate Cuba. This country has, from the beginning, acted in concert with the other American Republics in order to prevent the spread of commu-

nism. The January 1962 meeting of Ministers of Foreign Affairs of the American Republics took action which "excluded the present government of Cuba from participation in the inter-American system," resolved "to suspend immediately trade with Cuba in arms and implements of war of every kind," established a Special Consultative Committee on Security to advise governments on combatting Communist subversion, and urged member states "to take those steps that they may consider appropriate for their individual or collective self-defense, and to cooperate, as may be necessary and desirable, to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security resulting from the continued intervention in this Hemisphere of Sino-Soviet power * * *." Eighth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. C/II.8 (1962).

Early in October 1962, the Foreign Ministers agreed at an informal meeting in Washington that it was necessary for their countries to intensify measures to prevent activities of a subversive nature. 47 Dep't. State Bull. 598. The Foreign Ministers requested the Council of the Organization of American States to undertake an urgent study "of the transfer of funds to the other American Republics for subversive purposes, the flow of subversive propaganda and the utilization of Cuba as a base for training in subversive techniques." *Id.* at 600.

Pursuant to this request, a Special Committee of the Council prepared a series of studies, one of which considered the question of controlling travel to Cuba.

The study on travel, prepared early in 1963 and approved by the Council in July 1963, urged the American governments to take a series of measures (Report submitted by the Special Committee to Study Resolutions II.1 and VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. G/IV (1963)):

RECOMMENDATIONS ON CONTROL OF TRAVEL

The effective control of travel to Cuba should include both national and international procedures.

a. *National Procedures*

1. To provide that every person who crosses an international border must have in his possession some travel or identification document, and to exercise control over such documentation.

2. To prohibit trips to Cuba, as a general rule, and to regulate those that may be made to those persons who have valid reasons, such as those of an official or humanitarian nature. It would be advisable, in the corresponding stipulations, to consider the following suggestions, among others:

a. To limit the use of passports or other travel documents by means of an inscription stating that these are not valid for travel to Cuba, and to penalize as a violation of law any trip not authorized by the terms of the travel document.

b. To require that every person who desires to travel to Cuba present a request to that effect to the appropriate office and prove that he has a valid reason for making the trip. If the permit is issued, a state-

ment to that effect should be made on the passport itself.

c. To give wide publicity to the laws and regulations of each country in relation to travel to Cuba, and to inform the travel agencies and transport companies of them for due compliance therewith.

3. To provide to the immigration officers at the ports, border crossings, and airports a list of persons known to be agents or members of the communist party, and of those who have traveled to Cuba, for such control action as they deem necessary. For this purpose close cooperation between the police and immigration authorities is required.

4. To record in the passport or other travel documents authorized by the government of the traveler the date of departure, date of entry, destination, and place of origin.

b. *International Procedures*

1. To recommend to the governments that, in cooperation with one another, they:

a. Observe the limitations on travel that are noted in the respective documents. For example, a country "A" should take the steps necessary in order not to permit the departure for Cuba of a national of a country "B" whose documentation specifies that it is not valid for making such a trip. In relation to this measure, country "A" should not accept visas, tourist cards, or other documents for travel to Cuba that are not an integral part of the passport or travel document of a national of country "B".

b. Supply the other governments with information regarding its laws and regulations on travel.

c. Inform the diplomatic or consular authorities of the respective American country when a national of that country is refused departure for Cuba.

d. Transmit to the diplomatic or consular authorities of any other American country the names of its nationals that appear in the passenger list of every airplane or ship that departs for Cuba or comes from that country.

e. Examine minutely the travel documents of every passenger in order to prevent violations of the terms of those documents.

2. To establish a system for the exchange of information between governments on known communists, subversive agents, and persons who travel to Cuba.

In March 1963, the President of the United States met with the Presidents of the five Central American Republics and Panama to confer on problems common to the countries of that area, including subversion from Cuba. The Declaration of Central America which resulted from their Conference at San Jose stated (48 Dep't of State Bull. 517 (1963)):

> The Presidents agree that Ministers of Government of the seven countries should meet as soon as possible to develop and put into immediate effect common measures to restrict the movement of their nationals to and from Cuba,

and the flow of material, propaganda and funds from that country.

This meeting will take action, among other things, to secure stricter travel and passport controls, including appropriate limitations in passports and other travel documents on travel to Cuba. Cooperative arrangements among not only the countries meeting here but also among all OAS members will have to be sought to restrict more effectively not only those movements of people for subversive purposes but also to prevent insofar as possible the introduction of money, propaganda, materials, and arms. Arrangements for additional sea and air surveillance and interception within territorial waters will be worked out with cooperation from the United States.

The meeting of Ministers in Government took place on April 3d and 4th, 1963, at Managua, Nicaragua. Resolution I of the Managua meeting provided for travel restrictions closely similar to the study (see pp. 31–33, *supra*) previously prepared for, and later approved by, the Council of the Organization of American States (48 Dep't of State Bull. 719).

Finally, at their July 1964 meeting, the Ministers of Foreign Affairs of the American Republics resolved (Resolution I, Ninth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/Ser. F/II.9 (1964)):

a. That the governments of the American states not maintain diplomatic or consular relations with the Government of Cuba;

b. That the governments of the American states suspend all their trade, whether direct or indirect, with Cuba, except in foodstuffs, medicines, and medical equipment that may be sent to Cuba for humanitarian reasons; and

c. That the governments of the American states suspend all sea transportation between their countries and Cuba, except for such transportation as may be necessary for reasons of humanitarian nature.

3. The restriction on travel to Cuba plays an important part in isolating Cuba.

As a result of the individual and collective measures taken by the United States and the other American governments, and as a result of the growing understanding of the threat which Cuba represents for the free world, Cuba has to a large degree become isolated. All but one of the American governments have broken diplomatic relations with Cuba. Trade between the free world and Cuba is less than one-fifth of what it was in 1959. There is at present no passenger vessel service between Cuba and the free world and there is only one airline in the free world providing scheduled air service to Cuba. It has become progressively more difficult for persons to travel to and from Cuba for indoctrination and training in subversion.

The restriction on travel to Cuba imposed by the United States and the other American republics have been an important part of this policy of isolation. It is an important component of economic isolation since

travel by foreigners in Cuba produces much needed foreign exchange and is extremely useful for trade. Even more vital, restriction on travel is the principal means for preventing persons from going to Cuba for training in subversion and then returning to Latin America to perform what they have been taught. While most such persons are doubtless Latin American nationals and not citizens of the United States, it is unlikely that travel restrictions could be maintained if they did not apply to United States citizens as well as nationals of the other American republics. The United States has taken the lead in formulating and executing the inter-American policy of isolating Cuba, and other countries of the Hemisphere have to a considerable degree followed this lead. If the United States refused to continue its own participation in this collective effort to limit travel, it would be extremely difficult, if not impossible, to convince Latin Americans to impose greater restrictions on their citizens.

Furthermore, the indiscriminate travel of American citizens to Cuba could easily lead to incidents which might embroil the United States in international conflict. The foreign traveler may be arrested, held hostage, or otherwise abused. Such events actually occurred before the present Cuban government came to power, and in its early days. See, *e.g.*, International Commission of Jurists, *Cuba and the Law* (1962).

An integral part of American foreign policy is the government's commitment to protect all citizens. This policy implements an 1868 statute which com-

mands the President to protect all citizens from wrongful imprisonment by a foreign government by using "such means, not amounting to acts of war, as he may think necessary and proper * * *." Rev. Stat. Secs. 2000–2001 (1878), 22 U.S.C. 1732. While perhaps exceptions could be made, this general policy has three important advantages: (1) it assures every citizen that this country will take steps to protect him; (2) it tends to deter other countries from lightly interfering with the rights of American citizens; and (3) it avoids the international embarrassment of having United States citizens mistreated without any response from their government. The restrictions on travel to Cuba imposed by the Secretary virtually eliminate this problem by preventing all Americans, except those few in categories excluded from the restriction, from going to Cuba and thereby avoiding opportunities for Cuban harassment of American citizens. As a result, the United States is not placed in the dilemma of either imposing measures against Cuba to end harassment or ignoring such treatment of American citizens completely.

In sum, travel controls have been and are today an integral part of American foreign policy towards Cuba. They are an integral and vital part of the program adopted by the United States in cooperation with its neighbors, for isolating and containing the Cuban regime. And they help to minimize the possibility of international conflict with that country.

It is in this light that the power to adopt the measures as well as their constitutional validity must be judged.

B. THE SECRETARY HAS BEEN AUTHORIZED TO RESTRICT TRAVEL TO PARTICULAR AREAS, SUCH AS CUBA, PURSUANT TO THE NEEDS OF THE FOREIGN POLICY OF THE UNITED STATES

1. The Executive Branch, by virtue of its inherent power over foreign relations and the Passport Act of 1926, has authority to refuse passports for particular areas and to limit the countries for which a passport is valid, as required by the necessities of international relations

The broad scope of the President's authority to conduct foreign affairs has been recognized from earliest times to the present day. As the Senate Foreign Relations Committee stated almost 150 years ago, "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations. * * * For his conduct he is responsible to the Constitution." S. Doc. No. 231, 56th Cong., 2d Sess., 21 (1901) (reprinting an 1816 Report of the Senate Foreign Relations Committee). John Marshall stated in the House of Representatives in 1800 that the President is the "sole organ of the nation in its external relations." Annals, 6th Cong., col. 613. Similarly, this Court has held that the President's power over foreign affairs is "very delicate, plenary, and exclusive" and "does not require as a basis for its exercise an act of Congress * * *." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320. See also *United States* v. *Pink*, 315 U.S. 203, 229; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111; Corwin, *The President: Office and Powers 1787–1957* (4th rev. ed., 1957) 225.

The plenary executive power over foreign relations—the recognition of foreign governments, break-

ing or establishing diplomatic relations, recognizing a state of war or neutrality among nations, negotiating executive agreements, adjusting and extinguishing international claims, etc.—often affects the contracts, property and personal movement of private citizens. Thus, recognition or non-recognition of a foreign government may affect title to property. *United States* v. *Belmont,* 301 U.S. 324, 330; *United States* v. *Pink,* 315 U.S. 203, 229; *Latvian State Cargo & Passenger S.S. Line* v. *McGrath,* 188 F. 2d 1000, 1003 (C.A. D.C.); *The Maret,* 145 F. 2d 431 (C.A. 3). In *United States* v. *Pink, supra,* the rights of creditors to assets of the Russian Government held by the New York Superintendent of Insurance were extinguished by the Litvinov Assignment—an agreement entered into by the President incident to recognition of the Soviet Union without the participation of Congress.[5] The Court nonetheless said (*id.* at 228):

> If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment.

Similarly, although the settlement of foreign claims may reduce or extinguish the claims of U.S. citizens, it is indisputable that "the President's control of foreign relations includes the settlement of claims."

[5] For the documents pertaining to recognition, see Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dep't of State, Eastern European Series No. 1 (1933).

Mr. Justice Frankfurter concurring in *United States* v. *Pink*, 315 U.S. 203, 240. See also *Ozanic* v. *United States*, 188 F. 2d 228 (C.A. 2); *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F. 2d 464 (C.A. D.C.), affirmed, 311 U.S. 470.

The issuance or refusal of passports according to the necessities of international relations is likewise an integral part of the Executive's responsibility for foreign relations. In international law and diplomacy the suspension of travel to a foreign country is a recognized instrument of foreign policy. Bishop, *International Law*, 559 (1953); Stowell, *International Law*, 469 (1931); cf. 2 Hyde, *International Law*, 169–172, 185–186 (1922); 2 Lauterpacht-Oppenheim, *International Law*, 134–144 (7th ed., 1952). A passport is, in a sense, an instrument addressed by one government to another vouching for the bearer and seeking his protection. Travelers holding passports expect and receive a degree of recognition not extended to others. The refusal to issue passports also minimizes the risk of international complications arising from incidents affecting the person or property of travelers, whether or not the refusal of passports is actually coupled with a prohibition upon travel itself. The suspension of the issuance of passports valid for travel to a particular country is also a way of exerting pressure upon that country, whether or not all travel is actually interdicted. And we have shown above how an actual restriction upon travel to a particular area may be not only "an instrument of foreign policy" but indeed a foreign policy "in

and of itself." (*Worthy* v. *Herter*, 270 F. 2d 905, 910 (C.A. D.C.), certiorari denied, 361 U.S. 918).[6]

While the powers confided to the Executive by Article II of the Constitution would seem amply broad enough, even in the absence of legislation, to cover the issuance, refusal and restriction of passports in the execution of foreign policy, we need not rely exclusively upon the Executive's inherent power over foreign affairs. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, grants the President and the Secretary of State authority over passports in the broadest terms. Section 1 provides—

> The Secretary of State may grant and issue passports * * * under such rules as the Presi-

[6] There is no merit to the claim (Br. 41) that the President's inherent power over foreign affairs does not extend to matters affecting the right to travel because it is protected by the Fifth Amendment. If the Fifth Amendment secures an absolute right to travel, of course it may not be curtailed under either inherent executive power or express legislation. We deal with that claim below (pp. 66–74 *infra*). But if freedom to travel abroad is subject to reasonable restrictions imposed by pressing national interests, as we contend, then the fact that the restriction must be consistent with "due process of law" does not automatically exclude reliance upon inherent constitutional power over international relations. For example, the title to property, claims against foreign nationals, and the rights of creditors to the assets of a foreign government located in the United States are interests protected by the Fifth Amendment against arbitrary destruction yet such rights can constitutionally be altered or extinguished by an exercise of the Executive's inherent powers in foreign affairs. *United States* v. *Belmont*, 301 U.S. 324, 330; *United States* v. *Pink*, 315 U.S. 203, 229; *Latvian State Cargo & Passenger S.S. Line* v. *McGrath*, 188 F. 2d 1000, 1003 (C.A. D.C.); *The Maret*, 145 F. 2d 431 (C.A. 3). See also pp. 39–40 *supra*.

dent shall designate and prescribe for and on behalf of the United States * * *.

The provision is derived from Section 23 of the Act of August 18, 1856, 11 Stat. 52, which has been repeatedly reenacted without significant change.

On its face the power thus conferred is unequivocally discretionary; and, if the Secretary has any discretion, it must include the power to determine the countries for which passports will be issued. Such is the uniform interpretation of the lower courts. *Worthy* v. *Herter,* 270 F. 2d 905, 912 (C.A. D.C.), certiorari denied, 361 U.S. 918; *Frank* v. *Herter,* 269 F. 2d 245 (C.A. D.C.), certiorari denied, 361 U.S. 918; *Porter* v. *Herter,* 278 F. 2d 280 (C.A. D.C.), certiorari denied, 361 U.S. 918; *MacEwan* v. *Rusk,* 228 F. Supp. 306, 313–314 (E.D. Pa.), pending on appeal to the Third Circuit. The broad reading is strongly confirmed by the stipulation that the Secretary is to exercise the delegated power "under such rules as the President shall designate and prescribe"; for it is unlikely that Congress would have referred to the ultimate responsibility of the President unless it realized that broad authority was being conferred over a matter important in the conduct of policy.

It would seem to us, therefore, that the statutes authorizing the Secretary of State to issue passports, first enacted in 1856 and carried forward into the Passport Act of 1926, should be read as confirming and regularizing the broad authority which the Executive would otherwise have over passports as an incident of the conduct of foreign relations, so that the Act of 1926 is, in a substantial sense, an independent

source of the authority to limit the areas for which passports shall be issued. A niggardly construction should not be put upon a grant of authority to the Executive in legislation dealing with foreign affairs. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304; *United States* v. *Rosenberg*, 150 F. 2d 788 (C.A. 2), certiorari denied, 326 U.S. 752; *Star-Kist Foods, Inc.* v. *United States*, 275 F. 2d 472 (C.C.P.A.).

But it is unnecessary to pitch the case upon either source of authority alone, even though either alone would be sufficient. The law is not so artificial as to require the Secretary to find his authority exclusively in the statute or exclusively in the inherent constitutional authority of the Executive; nor does it require him to assign precise portions to each. The law, especially in this area, is a living organism. For more than a century the power conferred by statute and the authority derived from Article II have grown together in a symbiotic relation, confirmed and strengthened by executive practice, congressional acquiescence and reenactment of the statutory law. We summarize this history immediately below. The net effect is that the Secretary, acting under the orders of the President, now has full authority to restrict the issuance of passports generally, to limit the countries for which passports will be issued, and to limit the areas in which issued passports will be valid, according to international conditions and the needs of the foreign policy of the United States.

The Act of February 4, 1815, Sec. 10, 3 Stat. 195, prohibited citizens from traveling without a passport to territories or provinces belonging to the enemy, apparently assuming that the Executive had inherent power to issue or refuse passports. During the Civil War Secretary Seward issued an order prohibiting travel to Europe by citizens "on errands hostile and injurious to the peace of the country and dangerous to the Union." 3 Moore, *Digest of International Law*, 920 (1906).

Area restrictions were imposed for the first time in this century in January 1915. As a result of the famine in Belgium, the Department of State stopped issuing passports for use in that country except to "applicants obliged to go thither by special exigency or authorized by Red Cross or Belgian Relief Mission." 3 Hackworth, *Digest of International Law* 526 (1942). On January 24, 1917, because of the tensions resulting from the war in Europe, the President promulgated new "Rules Governing the Granting and Issuing of Passports in the United States." Exec. Order No. 2519–A, reprinted in For. Rel., 1917, Supp. 1, p. 573. Section 3 authorized the Secretary to refuse passports in his discretion. Section 5(b) required passport applicants going abroad on "commercial business" to submit a letter supporting the application and giving the particulars of the proposed trip. It also provided (*ibid.*):

> The applicant who is going abroad for any purpose other than commercial business must satisfy the Department of State that it is *imperative* that he go, and he should submit satisfactory documentary evidence substantiat-

> ing his statement concerning the imperativeness of his proposed trip.

It is noteworthy that these regulations cited as a source of authority the general passport legislation then current corresponding to the Passport Act of 1926. Act of June 14, 1902, 32 Stat. 386. The restrictions were imposed before the United States declared war and continued after the hostilities were terminated. No passports were issued for travel in Germany and Austria until July 18, 1922, and none for Russia until September 1923. *Department of State Passport Policies,* Hearings before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess., 64.

In 1919, the Department of State refused to issue passports for "unnecessary" travel from the United States to Europe. The restricted areas were not limited to enemy territory. The Department explained (3 Hackworth, *supra,* p. 530):

> The passport restrictions are maintained first because the Department deems it inadvisable in general to allow unnecessary travel between this country and Europe before peace has been declared, and second, because of conditions in Europe, particularly in the shortage of food and overtaxing of transportation and other services.

Area restrictions were imposed on several occasions during the 1930's. Passports were not issued for travel to Ethiopia, except to journalists and "well-known" writers, from November 1935 to July 1936. 3 Hackworth, *supra,* p. 531. Passports were stamped "not valid for travel in Spain," again with an exception for newspapermen, following the outbreak of the

Spanish Civil War in December 1936. *Id.* at 533. The measure was viewed as a part of the government's policy of non-intervention in the Spanish Civil War and was rigorously enforced. In addition to stamping passports, the Department required affidavits stating that it was not the traveler's intention to go to Spain. A similar, but more stringent, restriction was placed on travel to China in August 1937, in view of "the disturbed situation in the Far East." Passports were validated for travel to China only "in exceptional circumstances," and in no cases for women or children. *Id.* at 532.

On March 31, 1938, the President, acting under the Passport Act of 1926, specifically authorized the Secretary to impose area restrictions in the issuance of passports. Executive Order No. 7856, issued on March 31, 1938, provides (22 C.F.R. 51.75):

> *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

The executive order is still in force.

In September 1939, following the issuance of the executive order, conditions in Europe led to a general tightening of passport controls. Travel to Europe was prohibited except with a passport specially validated for such travel. Passports were validated only upon a showing that the proposed

travel was imperative. Departmental Order No. 811, 4 Fed. Reg. 3892.

Area restrictions have been imposed on numerous occasions since World War II. Travel to Yugoslavia was restricted between 1947 and 1950 as a result of a series of incidents involving American citizens (Dep't of State Press Conference, May 9, 1947). Travel to Hungary was restricted between December 1949 and May 1951 in order to secure the release of Robert Vogeler, an American citizen imprisoned by the Hungarian Government (22 Dep't of State Bull. 399), between December 1951 and October 1955 in connection with the imprisonment of four American fliers (26 *id.* at 7), and after February 1956, as a result of the Hungarian revolt (34 *id.* at 246). Similar measures were taken against Czechoslovakia in June 1951, to effect the release of the American journalist, William Oatis.[7] 24 *Id.* at 932. In May 1952 passports were stamped not valid for travel to Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Rumania, and the Soviet Union. 33 Dep't of State Bull. 777.[8] On October 21, 1955, the Secretary

[7] Section 1732 of 22 U.S.C. directs the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of an American citizen "unjustly deprived of his liberty by or under the authority of any foreign government."

[8] Appellant claims (Br. 42–43) that Press Release 341 shows that the State Department does not have authority to make area restrictions. The press release stated that the procedure for restricting passports did not forbid American travel to the named areas and went on to say: "It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if

of State announced that passports would not require special validation for travel to Czechoslovakia, Hungary, Poland, Rumania, and the Soviet Union but would be stamped invalid for travel "to the following areas under the control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria and those portions of China, Korea, and Viet-Nam under communist control." 33 Dep't of State Bull. 777. In 1956 passports were for a brief period stamped invalid for travel to or in Egypt, Israel, Jordan, and Syria. 35 Dep't of State Bull. 756.[9]

In sum, for more than a century the Secretary of State, acting under the President, has restricted the issuance of passports, refused passports for travel in particular areas, and specified particular areas in which issued passports would be invalid, whenever in their judgment world conditions or implementation of the foreign policy of the United States so required. Congress has never questioned the executive interpretation of the authority over passports, including the area restrictions; nor has it been challenged, except lately, in the courts. On a number of occasions—

---

no objection is perceived, the travel may be authorized." Read as a whole, the press release simply indicated that exceptions to the general prohibition on travel could be authorized by the State Department.

[9] For further discussion of the Secretary's use of area restrictions, see *e.g.*, 3 Hackworth, *Digest of International Law*, 524–536 (1942); 3 Moore, *Digest of International Law*, 1015–1021 (1906); *The Right to Travel*, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. 190–194 (1957).

the latest in 1926—Congress reenacted the same broad passport legislation against the background of executive practice. In 1941 and 1952, as we shall show, Congress must have surveyed the established practice in issuing or refusing passports when it made travel without a valid passport, under certain conditions, a criminal offense, yet with that interpretation before it, Congress did nothing to curtail the authority asserted by the Executive Branch.

Under these circumstances the long history of executive practice has threefold importance. *First,* to the extent that the practice was expressly or impliedly based upon the passport legislation, it is entitled to great weight as the consistent interpretation of a statute by the officials charged with its administration. *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294; *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740; *Costanzo* v. *Tillinghast,* 287 U.S. 341.

Second, the use of the general discretionary language in the Passport Act of 1926, after the power to impose area restrictions upon passports had been asserted under prior legislation (sometimes with and sometimes without reference to the statutory authority), demonstrates approval of the administrative interpretation. *United States* v. *Cerecedo Hermanos y Compania,* 209 U.S. 337, 339; *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 544–545; *Service* v. *Dulles,* 354 U.S. 363, 380; *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U.S. 361, 366; see also the cases cited in Davis, *Administrative Law Treatise,* 331–338.

Third, insofar as the area restrictions imposed in the issue of passports should be understood to have been based upon the inherent power of the Executive over foreign relations, the long-settled practice is entitled to great weight in the interpretation of the constitutional authority. *The Pocket Veto Case,* 279 U.S. 655, 688–689.

The nub of the matter was succinctly stated in *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472–473, where the Court upheld the inherent authority of the Executive to close public lands that Congress had previously opened to private acquisition, relying upon a long-established executive practice which had never been challenged by Congress:

> But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the assumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule, that in determining the meaning of a statute or the existence of a power, weight should be given the usage itself—even when the validity of the practice is the subject of investigation.

See also *Inland Waterways Corp.* v. *Young,* 309 U.S. 517, 525; *Ray* v. *Blair,* 343 U.S. 214, 229; *Van Dyke*

v. *Geary*, 244 U.S. 39, 46 (discussing the Arizona Constitution); *United States* v. *Allocco*, 305 F. 2d 704, 714 (C.A. 2), certiorari denied, 371 U.S. 964.[10]

Appellant argues (Br. 26) that whatever authority was exercised under the passport acts or pursuant to the inherent executive power did not include the prohibition of all travel to a proscribed area; perhaps a citizen could not obtain a passport for a restricted area, appellant says, but there was no legal barrier to the travel itself. The objection is irrelevant. We are not arguing that the Passport Act of 1926, standing alone, confers authority to prohibit actual travel in the sense that the journey would be a crime or offense against the United States or could be prohibited by the government. And although we believe that it exists, there is no need for us to rely in this case (or in any other case under the 1952 legislation) upon an inherent executive power to impose a legal prohibition upon travel to a particular country with-

[10] Appellant claims (Br. 29) that lack of executive power under Section 211a is shown by Congress' failure to pass any of the bills providing for area restrictions which have been introduced in recent years. The opposite inference, that Congress considered such legislation superfluous, is, in view of the practice of imposing such restrictions, far more plausible. The bills submitted by the executive branch were omnibus passport bills intended to deal with a wide range of problems, including that of denying passports to Communists. Consequently, the failure of Congress to act on these bills says little about Congressional attitudes towards the particular problem of area restrictions.

out the aid of legislation. The practical effect of the suspension of the issuance of passports for specified areas must always have been to suspend normal travel to those areas, but whether that was the consequence or not is immaterial. We are concerned at this stage of the argument only with showing that at the time Congress enacted Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, the Secretary, whatever the legal consequences of his action, had consistently exercised the authority to deny passports for travel to a particular area as required by the state of international relations.[11] We

---

[11] In fact, travel without a passport was a crime during a good part of the period in question. While the Act of May 22, 1918, 40 Stat. 559, was in force, during and after both World War I and World War II, travel without a passport was a criminal offense, and during those periods passports were not issued for restricted areas under the authority of regulations issued by the President under the general passport legislation.

Appellant erroneously asserts (Br. 26) that area restrictions prior to 1926 were imposed only during wartime. Travel to Belgium was prohibited in 1915, before the United States entered World War I. The restrictions on travel to Germany and Austria imposed under the President's 1917 Rules were not lifted until July 18, 1922, long after the war ended, and those on travel to Russia not until September 1923. *Department of State Passport Policies*, Hearings, *supra*, p. 64.

Appellant is also in error in claiming (Br. 27), with respect to the Passport Act that "in the various restrictions imposed by the Secretary after 1926, there was again no claim that travel was prohibited * * *." Departmental Order No. 811; 4 Fed. Reg. 3892, issued when area restrictions were imposed in 1939, cited 22 U.S.C. 211a as authority. The Department in this Order called attention to 22 U.S.C. (1940 ed.) 221 (now 18 U.S.C. 1544), which made it a criminal offense willfully "to use any passport in violation of the conditions or restric-

consider below (pp. 56–62, *infra*) whether congress modified or confirmed that broad control over the issuance and denial of passports, when it attached a statutory prohibition against travel to the denial or restriction of a passport by the enactment of Section 215.

Kent v. *Dulles,* 357 U.S. 116, is not contrary to our position. The sentence on page 129 asserting that if liberty of travel is to be regulated it must be pursuant to the lawmaking functions of Congress, like the holding that the power to deny Kent his passport was not conferred by the Act of 1926, must be read in the context of the issues presented by the case. The central question was whether a citizen could be denied a passport and barred from leaving the country because of his beliefs or associations. As the Court said, "We deal with beliefs, with associations, with ideological matters." *Id.* at 130. Appellant in this case has not been singled out or deprived of rights which other citizens are granted. Beliefs and associations play no role under the orders at stake. Travel to Cuba has been restricted for reasons related solely to the foreign policy interests of the United States, and not, as in *Kent,* "solely because of [the applicant's] refusal to be subjected to inquiry into their beliefs and associations." *Ibid.*

Similarly, the long passage from *Kent* quoted on page 25 of appellant's brief, in which the Court

tions therein contained." Moreover, any failure to claim that the restrictions upon travel were a barrier to actual travel during the 1930's is irrelevant. It was not until the Act of June 21, 1941, 55 Stat. 252, that the denial of passports resulted in a legal disability from travelling abroad (see pp. 58–59 *infra*).

summarized the prior practice in the refusal of passports *so far as material in that case,* must be read with reference to the kind of refusal there challenged—a refusal based upon the character of the particular applicant, not upon considerations of foreign policy affecting all persons seeking passports valid for a particular area. That the passage purports to do no more is evident (1) from Mr. Justice Douglas' careful statement that he was summarizing the cases of prior refusal "So far as material here"; (2) from the instances listed; and (3) from the omission of any reference to the widely-known area restrictions imposed upon all travellers according to the demands of foreign policy.

Moreover, *Kent* concerned "the right of exit," an historic right asserted at least as early as 1215 in Articles 41 and 42 of the Magna Carta to prevent the King from confining his subjects within the realm. See 41 Geo. L.J. 63, 66–67. (1952). The "right of exit," both historically and in its practical impact, is significantly different from the right to travel to a particular area. Historically, the right to leave one's country has been thought of as a right to emigrate in order to escape persecution or confinement, and not as an unrestricted right to travel to any particular place in the world at any time. See Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country,* U.N. Doc. No. E/CN.4/Sub. 2/220/Rev. 1, pp. 1–9 (1963). The "right of exit" is not at issue in this case since appellant has not

been denied the right to leave the country. He may travel to almost any country in the world.[12]

In summary, we think it plain that by virtue of the Passport Act of 1926 and the inherent executive power over international relations the Secretary of State, acting under the President, had ample power, prior to the Immigration and Nationality Act of 1952, to take account of international conditions and implement the foreign policy of the United States by withholding passports intended for travel to particular areas and limiting the validity of the passports he issued. The legal consequences of an exercise of that power in the absence of other legislation may be open to dispute, but the existence of the power over passports is beyond debate. We show next that when Congress, in the Act of 1952, forbade travel without a valid passport under specified conditions, and thus by statute made the withholding or restriction of a passport in substance a limitation upon travel, Congress ratified and confirmed the power of the Secretary and the President to impose appropriate area limitations.

---

[12] Appellant cites (Br. 55) the Universal Declaration of Human Rights as setting forth "the principles of liberty of movement which underlie this case." The Declaration of Human Rights states (U.N. Dep't of Public Information, Universal Declaration of Human Rights, Article 13, S. Doc. 123, 81st Cong., 1st Sess. 1156):

> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and return to his country.

To the extent that the Declaration is relevant, appellant enjoys the rights it asserts. He has the right to leave and return to his country.

2. Section 215 of the Immigration and Nationality Act confirms the authority of the Secretary to impose area restrictions in the issuance of passports and prohibits travel in violation thereof

Section 215(b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185(b), provides—

> (b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

The required proclamation having been issued,[13] it is Section 215(b) that makes the withholding or restriction of the validity of a passport a legal prohibition upon travel to an interdicted area.

When Congress enacted Section 215(b), it must have been aware of the Secretary's assertion and repeated exercise of authority, under the President, to limit the issuance of passports for travel to troubled areas, as required by world conditions and the foreign policy of the United States. The prior refusals to issue passports for Belgium, Ethiopia, Spain, China, Europe, Hungary and Czechoslovakia during such periods were widely publicized. In 1952

[13] See pp. 62–66 *infra*.

there was outstanding an Executive Order expressly authorizing the Secretary of State in his discretion (22 C.F.R. 51.75)—

> to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries * * * and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

While Section 215(b) was being debated in Congress, area restrictions were being applied by the Secretary in the case of Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Romania and the Soviet Union. See p. 47 *supra.*

Manifestly, the new provision was not intended to curtail the existing discretion of the Executive to limit the areas for which passports would be valid, and to refuse passports intended for travel to the excluded areas, when such travel by U.S. citizens would be inconsistent with pressing international considerations. The Act of 1952 did nothing to limit the discretionary authority over passports that the Executive had long and widely asserted. Since Congress was legislating in the area of passports, even silent acquiescence would have been enough to evidence a legislative intent to have the practice continue. See *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472–473, and the cases cited at pp. 50–51 *supra.* The present case is even stronger. Congress did not merely acquiesce. Section 215(b) of the 1952 Act took the existing authority over passports as its predicate in prohibiting travel without a valid

passport. Without it the provision would be inoperable because no new authority over the issuance of passports was expressly granted. It would be wholly artificial to suppose that Congress predicated the existence of any different power than had been consistently asserted by the President and Secretary. Section 215(b), therefore, had a twofold effect: (a) it implicitly ratified the existing discretionary power to impose area restrictions in the issuance of passports as an incident of foreign policy; and (b) it attached to the refusal or restriction of a passport the statutory consequence of a legal prohibition against the travel. The net result of Section 215(b) of the 1952 Act, operating in conjunction with the broad and established authority over passports under the 1926 Act and/or the inherent powers of the Executive, is therefore to confirm to the President and the Secretary the power to suspend all travel to specified areas in times of proclaimed emergency as the necessities of international relations may require.

There was nothing novel in this course of proceeding. In 1917, as we have shown, the President, citing the authority of a precursor of the Act of 1926, issued general regulations giving the Secretary broad authority over the issuance of passports, and the Secretary imposed various restrictions including restrictions as to area. See pp. 44–45 *supra*. Thereafter, in words virtually identical to the corresponding provision of the Act of 1952, Congress enacted legislation, applicable while the United States was at war, which prohibited a citizen from entering or leav-

ing the United States "unless he bears a valid passport." Act of May 22, 1918, 40 Stat. 559. Obviously the 1918 statute picked up and confirmed the discretionary authority that the Executive was actually exercising and then attached to the refusal or restriction of a passport a legal interdiction of the travel. That was the interpretation placed upon the statute during its operation. See p. 45 *supra*.

Congress followed essentially the same course in the Act of June 21, 1941, 55 Stat. 252. During the preceding decade the Secretary of State had frequently imposed area restrictions upon passports and, as we have seen, the President issued an executive order in 1938 explicitly authorizing the practice. See pp. 45–46 *supra*. The Act of June 21, 1941, thereafter revived the statutory interdiction of travel without a valid passport by amending the 1918 statute so as to make it effective not only when the United States is at war but also "during the existence of the national emergency proclaimed by the President on May 27, 1941." 55 Stat. 252. Area restrictions were imposed while this statute was in force until 1952 when the impending cessation of the legal state of war invited renewed congressional attention.

Against this background the significance of Section 215(b) of the Act of 1952 becomes clear. The material portions are taken almost verbatim from the 1918 statute revived in 1941. The obvious intent was to have Section 215(b) operate in like fashion. Under such circumstances reenactment without change incorporates the prior interpretation by those charged with

760-044—65——6

administering the legislation. *United States* v. *Cerecedo Hermanos y Compania,* 209 U.S. 337, 339, and the cases cited at p. 49 *supra.*

This is also the manner in which Section 215(b) of the 1952 Act was interpreted shortly after its enactment by the executive officials charged with its administration. Presidential Proclamation No. 3004, 67 Stat. C31, which was issued in 1953 pursuant to Section 215(b), specifically stated that the departure of citizens would be governed by 22 C.F.R. 53.1 to 53.9. Section 53.8 of 22 C.F.R. provided in pertinent part (22 C.F.R. (1949 ed.) 53.8):

> § 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

This administrative interpretation of the statute is entitled to considerable weight (see the cases cited at p. 49 *supra*).

Section 215(b) does not confront the Executive with the bare alternative of interdicting any departure from the United States or allowing travel to any country. The practice under its predecessors belies that interpretation, as does the consistent use of area restrictions upon passports unaccompanied by statutory interdiction of unapproved travel. As the district court said in *MacEwan* v. *Rusk,* 228 F. Supp.

306, 310 (E.D. Pa.), pending on appeal to the Third Circuit:

> If the statute is broad enough to prohibit the departure of a citizen from the United States without a valid passport, it is difficult to see why a partial barrier is not within the statute. If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power.

Finally, it is persuasive that every court which has considered the question has upheld the area restrictions upon travel resulting from the Secretary's refusal or restrictions of passports in conjunction with Section 215(b). In *United States* v. *Healy,* 376 U.S. 75, 82–83, note 7, the Court noted in passing that the Secretary's denial of a passport valid for Cuba would make a trip to the island unlawful.[14] The Court of Appeals for the District of Columbia Circuit has three times upheld the area restrictions (*Worthy* v. *Herter,* 270 F. 2d 905, certiorari denied, 361 U.S. 918; *Frank* v. *Herter,* 269 F. 2d 245, certiorari denied, 361 U.S. 918;

---

[14] Appellees had been indicted for forcing the pilot of a private plane to fly them from Florida to Cuba. The Court said (*id.* at 83, note 7):

> However, it may be observed that a trip to Cuba would have been lawful only if appellees had had passports specifically endorsed for travel to Cuba. See Presidential Proclamations No. 2914, Dec. 16, 1950 (64 Stat. A454); and No. 3004, Jan. 17, 1953 (67 Stat. C31); § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185; Department of State Public Notice 179, 26 Fed. Reg. 492, Jan. 16, 1961.

Porter v. *Herter*, 278 F. 2d 280, certiorari denied, 361 U.S. 918)), as did both the court below (R. 32–67) and the three-judge district court in *MacEwan* v. *Rusk*, *supra*.[15]

3. The authority to withhold passports valid for Cuba and thus to prohibit travel to the island has been properly exercised

a. The power of the Executive Branch to restrict the issuance of passports to particular countries under its inherent power or the Passport Act of 1926 exists regardless whether there is a national emergency. However, Section 215 of the Immigration and Naturalization Act of 1952 (8 U.S.C. 1185) imposes the requirement of a passport only when the President has proclaimed a national emergency and has found that restrictions upon departure from this country are required. Otherwise, there is no statutory impediment to travel without a passport.

President Truman proclaimed a national emergency in 1950. Pres. Proc. No. 2914, 64 Stat. A454. In 1953, President Truman again found that a national

[15] Judge Bazelon, whose dissent in *Briehl* v. *Dulles*, 248 F. 2d 561, 581 (C.A. D.C.), reversed *sub. nom. Kent* v. *Dulles*, 357 U.S. 116, foreshadowed the decision of this Court, nevertheless recognized the broad authority to impose area restrictions under Proclamation No. 3004, which brought into play the provisions of Section 215(b) of the 1952 legislation:

> This authorization, like the authorization of Executive Order 7856 to issue "additional" *passport* regulations, must be read in its context. Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports.

emergency existed and, pursuant to Section 215, imposed the restriction that Americans could not depart without a passport except to countries in the Western Hemisphere. Pres. Proc. No. 3004, 67 Stat. C31. The existence of a national emergency has subsequently been reaffirmed by President Eisenhower in 1960 (Exec. Order No. 10896, 3 C.F.R. (1959–1963 Supp.) 425) and President Kennedy in 1962 (Exec. Order No. 11037, 3 C.F.R. (1959–1963 Supp.) 621).

Appellant contends (Br. 51–54) that this Court is not bound by the President's proclamation of a national emergency, and that no such emergency exists. However, the proclamation of a national emergency involving an external threat to the security of the United States and friendly nations is within the discretion of the Executive. *Worthy* v. *Herter, supra,* 270 F. 2d at 910, 913; *Shactman* v. *Dulles,* 225 F. 2d 938, 941–942; see *Ludecke* v. *Watkins,* 335 U.S. 160, 170. The cases relied upon by appellants are easily distinguishable. They involve, not the foreign policy or national security of the United States, but such economic matters as housing, bankruptcy, and banking. In any event, even if the courts can properly inquire into the President's decision to declare a national emergency, this would not help appellant here. It is obvious that the emergency still continues. *MacEwan* v. *Rusk, supra,* 228 F. Supp. at 313. This nation was not far from war in West Berlin in the summer of 1961 nor in Cuba in October 1962, and there are numerous recent examples of Communist aggression in Hungary, Laos, Viet-Nam, Africa, and elsewhere which hardly require description here.

b. The Secretary of State, rather than the President, imposed area restrictions on travel to Cuba. Congress has provided that "[t]he Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to * * * such * * * matters respecting foreign affairs as the President of the United States shall assign to the department * * *." 5 U.S.C. 156. The President has specifically authorized the Secretary, under the authority of the Passport Act, in his discretion "to restrict the passport for use only in certain countries." Exec. Order No. 7856, 3 Fed. Reg. 799, 805, 22 C.F.R. 51.76. Presidential Proclamation No. 3004, 67 Stat. C31, issued pursuant to 8 U.S.C. 1185, makes the travel of citizens to and from the United States "subject to the regulations prescribed by the Secretary of State," incorporates into the Proclamation a regulation of the Department of State (22 C.F.R. 53.8) which refers specifically to the Secretary's authority to make area restrictions, and authorizes the Secretary to "revoke, modify, or amend such regulations according to the national interest." [16] While these delegations cited statutory authorization, they equally serve to delegate the President's inherent authority. Pursuant to these grants of authority, the Secretary issued 22 C.F.R. 53.3b, which removed Cuba from the

[16] Judge Bazelon in dissenting in *Briehl* v. *Dulles*, 248 F. 2d 561, 581 (C.A. D.C.), reversed *sub nom. Kent.* v. *Dulles*, 357 U.S. 116, said that Presidential Proclamation No. 3004 "grants the Secretary discretion * * * to determine which parts of the world can be visited by Americans** * *."

area exempt for the requirement of a passport and Public Notice 179 (26 Fed. Reg. 492) which made passports invalid for travel to Cuba unless specifically endorsed for such travel. Thus, the President plainly has delegated to the Secretary his power to make the area restriction involved in this case, and the Secretary has exercised that authority in promulgating the restriction.

Appellant states (Br. 44) that "[t]he claim of delegation is rendered even weaker in the instant case, since it was not the Secretary, but a Deputy Under Secretary of State, who imposed the ban on travel to Cuba." While appellant seems now to be suggesting that this does not constitute issuance by the Secretary, his amended complaint expressly and, we believe, correctly stated that Public Notice 179 (26 Fed. Reg. 492)—which made American passports invalid for travel to Cuba unless specifically endorsed for such travel—was issued by the "Secretary of State, through his Deputy Under-Secretary for Administration * * *" (R. 2). Thus, far from being raised in the trial court, this issue was conceded. Appellant cannot raise it for the first time here. This is particularly true since appellant's failure to raise this issue in the district court has precluded the United States from introducing evidence that the Notice was issued by the Secretary. See *United States* v. *Di Re,* 332 U.S. 581, 588; *Giordenello* v. *United States,* 357 U.S. 480, 487–488.

In any event, the Deputy Under Secretary specifically signed Public Notice 179 "[f]or the Secretary of

State." It seems clear that the Deputy Under Secretary signed Public Notice 179 for the Secretary since the Notice refers to "the authority vested in *me* by Sections 124 and 126 of Executive Order 7856 * * *" (emphasis added). That authority is vested in the Secretary. 3 Fed. Reg. 799, 22 C.F.R. 51.75–51.77. Furthermore, the records of the Department of State show that the decision to restrict travel was made by the Secretary of State on January 14, 1961.

III

THE RESTRICTION LIMITING TRAVEL TO CUBA DOES NOT INFRINGE ANY OF APPELLANT'S CONSTITUTIONAL RIGHTS

A. THE RESTRAINT ON TRAVEL TO CUBA DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO TRAVEL

1. The right to travel is subject to reasonable regulation

In *Kent* v. *Dulles*, 357 U.S. 116, 125, this Court held that the "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." But this statement is only the beginning, and not the end, of the inquiry necessary to determine whether this particular limitation on the right to travel—the prohibition against going to a single country—violates any constitutionally-protected right of appellant. For the "liberty" which the due process clause guarantees is not absolu[illegible] but is subject to such regulation as is reasonably necessary to accommodate the proper ends of government. See *Bolling* v. *Sharpe*, 347 U.S. 497, 499–500. Moreover, as Mr. Justice Holmes observed

in *Moyer* v. *Peabody,* 212 U.S. 78, 84, "it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." See also *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 163 (Mr. Justice Frankfurter concurring).

Our society abounds with numerous restrictions upon the rights which the due process clause protects. The right of property is limited by innumerable forms of taxation and regulation. Similarly, the right to liberty may be limited in ways far more strict and confining than restrictions on travel to a particular country. For example, compulsory military service takes a man from his residence and occupation for service in the armed forces. See *Selective Draft Law Cases,* 245 U.S. 366; *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642, note 19. Similarly, children may be required to go to school, the insane may be confined to institutions, and the sick may be quarantined, for these are recognized as reasonable limitations on personal liberty.

In short, the due process clause protects life, liberty, and property only against arbitrary government action, and does not bar reasonable regulation. The right to travel, being one aspect of the right to liberty (*Kent* v. *Dulles, supra,* 357 U.S. at 125), is therefore subject to reasonable regulation.

The lower federal courts have uniformly agreed that the right to travel may validly be restricted as long as the restrictions are reasonable. In *Worthy* v.

Herter, 270 F. 2d 905, 909, certiorari denied, 361 U.S. 918, the Court of Appeals for the District of Columbia Circuit stated that "the right to travel, like every other form of liberty, is, in our concept of an ordered society, subject to restrictions under some circumstances and for some reasons." Similarly, in *Shachtman* v. *Dulles,* 225 F. 2d 938, 941 (C.A. D.C.), the court held that the right to travel is "subject to the rights of others and to reasonable regulation under law." Accord, *Worthy* v. *United States,* 328 F. 2d 386, 393 (C.A. 5); *MacEwan* v. *Rusk, supra,* 228 F. Supp. at 308; *Bauer* v. *Acheson,* 106 F. Supp. 445, 451 (D. D.C.). Indeed, in the *Kent* case itself, this Court recognized that reasonable restrictions of the right to travel were constitutionally permissible, since it said that a passport might be denied if "the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U.S. at 127.

2. The restriction on travel to Cuba is reasonably and integrally related to the conduct of United States foreign policy

For six years, United States relations with Cuba have been troubled and difficult. The story of these years is the story of tensions, provocations, incidents, and crises. United States citizens have been arrested without charges, harassed, kidnapped and even killed. American property and business interests totalling more than one billion dollars have been expropriated. And external Communist power has gained its first and only beachhead in the Western Hemisphere, a beachhead which has been of great concern to the

other Republics in this Hemisphere and which led, in October 1962, to the Cuban missile crisis.

As we have seen in Part II of this brief (pp. 21–37), United States policy during these years has been directed at isolating Cuba and preventing it from either becoming again a direct military threat to the Western Hemisphere or subverting the other American Republics. The full range of American resources—military, political, and economic—has been deployed to carry out this policy. This has been done in cooperation with the other American governments through the machinery of the inter-American system. The policy has involved the severance of diplomatic and consular relations, increasing trade restrictions, and even the use of military force.

A major goal of the Castro regime in Cuba is to export its Communist revolution to the rest of Latin America. Under Secretary of State George Ball recently described this threat to the national security of the United States as "the menace of subversion—the undermining of existing governments, the arming of organized Communist minorities, and the mounting of campaigns of sabotage and terror." Ball, *U.S. Policy Toward Cuba,* Dep't of State Pub. No. 7690, p. 3 (1964). Earlier in 1961, an official Government "White Paper" on Cuba similarly stated (*Cuba,* Dep't of State Pub. No. 7171, p. 2):

> It is the considered judgment of the Government of the United States of America that the Castro regime in Cuba offers a clear and present danger to the authentic and autonomous revolution of the Americas—to the whole hope of spreading political liberty, economic develop-

ment, and social progress through all the republics of the hemisphere.

Travel between Cuba and the other countries of the Western Hemisphere is an important element in the spreading of subversion to those countries by the Castro government. The United States and the other members of the Organization of American States have coordinated their policies and undertaken collective measures designed to restrict travel with Cuba. If the United States were to withdraw from this collective endeavor, it is doubtful whether the present inter-American restrictions on Cuban travel could be maintained. If those restrictions were weakened or abandoned, it would greatly increase the opportunities of the Cuban Government for infiltration and subversion.

Moreover, permitting unrestricted travel by American citizens to Cuba could easily lead to incidents of the most serious kind. In the early period of the Castro regime United States citizens were harassed in numerous ways, arrested without charges, and even put to death. At the present time there is no way of limiting the risk of such incidents or of dealing with them through normal diplomatic channels. Even though United States citizens had been warned by the State Department that they entered Cuba at their own risk, a disastrous international chain of events might all too quickly result from recurrence of such incidents involving our citizens.

In short, the general restriction upon the right to travel to Cuba is supported by the weightiest of for-

eign policy considerations. In the light of (1) the tremendous importance which the United States ascribes to isolating Cuba, in order to prevent it from exporting subversion to other countries in this hemisphere, (2) the serious danger that permitting unrestricted travel by United States citizens to Cuba would lead to a weakening of the coordinated effort of this hemisphere to isolate that country, and (3) the possibility that incidents involving our citizens in Cuba would have most serious international repercussions, we submit that prohibiting travel to Cuba by American citizens is a reasonable regulation of the right to travel that does not violate the due process clause.[17]

The fact, to which appellant points (Br. 48), that certain narrow exceptions have been permitted to the restriction, provides no ground for invalidating the general ban. The exceptions are extremely limited: travel is permitted only for such groups as newsmen, clergymen representing denominations in Cuba, businessmen with previously established businesses in

---

[17] As the court of appeals stated in *Worthy* v. *Herter*, *supra*, 270 F. 2d at 911:

> We think that, if the Executive foresees that the presence of American citizens in a designated foreign area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction the travel of American citizens in that area. To hold the contrary would be to hold that the protection of the peace against American-caused incidents in foreign countries is outside the realm of foreign affairs. Such latter holding would be both illogical and unrealistic.

Cuba, and persons whose relatives in Cuba face severe illness or death. But the danger that permitting our citizens to travel to Cuba would lead to a serious weakening or breakdown of the joint inter-American effort to isolate Cuba obviously is far less where only narrow categories and small numbers are involved than it would be if there were unrestricted travel. Furthermore, there is much less likelihood of incidents involving United States citizens in Cuba when only a small number is permitted to go there, and for important reasons. Even though such minimal travel entails some risk of incidents, it is outweighed by the national interest in permitting such travel.

Nor is there any merit to appellant's contention (Br. 50–51) that the restriction on travel to Cuba interferes "with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." No case has even suggested that the First Amendment gives any such right; the cases hold unanimously that liberty to travel abroad is protected by the due process clause of the Fifth Amendment. *E.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 505; *Kent* v. *Dulles, supra,* 357 U.S. at 129; *Shachtman* v. *Dulles, supra,* 225 F. 2d at 941; *Bauer* v. *Acheson, supra,* 106 F. Supp. at 450–451. Under appellant's argument, a wide variety of activities whose protection now rests upon other clauses of the Constitution would for the first time come under the First Amend-

ment. For example, denial of a security clearance would arguably conflict with the First Amendment because, by preventing access to classified material, it would deny citizens information useful in forming judgments on matters of public policy. The broad implications of appellant's First Amendment argument shows its fallacy—that the right to speak and publish does not carry with it the right to obtain all information that may be used for such protected purposes.

To be sure, in some circumstances limitations upon travel may raise First Amendment issues. It was argued in *Aptheker* v. *Secretary of State* that restrictions on travel were being used as a sanction against certain views and associations. But that contention cannot be made here. What appellant has said or written, the people with whom he has associated and the organizations he has joined, are all irrelevant. Appellant has not been required to choose between membership in an organization on the one hand and travel on the other. *Aptheker* v. *Secretary of State, supra,* 378 U.S. at 507. He and all other U.S. citizens (with a few narrow exceptions) have been denied passports valid for travel to Cuba solely because of foreign policy and national security considerations involving American relations to Cuba.

Since we believe that the First Amendment is plainly not relevant to this case, we discuss only briefly the question whether appellant's rights have been violated if it does apply. The government's position is that, at most, the restraint is indirect

and incidental. It is well established that the incidental restraint must be weighed against the governmental interest involved. *E.g., Martin* v. *Struthers,* 319 U.S. 141, 143. Here, as we have seen above (pp. 21–37, 68–77), the restraint on travel to Cuba is reasonably and integrally related to an important part of American foreign policy toward Latin America and to the protection of national security. Few governmental interests are of greater importance. On the other hand, appellant is restricted from traveling only to a single country which he wishes to visit because of a desire to become better informed (R. 54). In these circumstances, his personal interest is far outweighed by the governmental interests involved.

B. THE STATUTE AUTHORIZING THE RESTRAINT ON TRAVEL TO CUBA IS NOT UNCONSTITUTIONALLY VAGUE

The constitutional doctrine of vagueness upon which appellant challenges the Passport Act (Br. 23–24) has no relevance to this case. As the cases cited by appellant demonstrate (Br. 24), that doctrine applies to situations in which prohibited conduct is not clearly specified. See, *e.g., Cramp* v. *Board of Public Instruction,* 368 U.S. 278; *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495; *Winters* v. *New York,* 333 U.S. 507. In other words, it is intended to insure that people will know what conduct is permitted or prohibited by law. For example, in *Cramp,* where the Court struck down a Florida statute requiring State employees to swear that they had never given "aid, support, advice, counsel, or influence to the Communist Party" (368 U.S.

at 279), it pointed out that it was impossible for them to know what conduct the oath covered. Thus, employees were faced with the alternative of quitting or taking an oath, which, although they believed it to be true, might subject them to criminal sanctions.

Appellant faces no such dilemma in this case. He cannot have any doubt that if he travels to Cuba without a passport validated for that country he will violate 8 U.S.C. 1185 and be subject to prosecution thereunder. The prohibition on travel to Cuba without a passport specifically endorsed for such travel has been published in the Federal Register (Public Notice No. 179, 26 Fed. Reg. 492) and has been announced in a Department of State Press Release (No. 24). Indeed, the prohibition on travel to Cuba is stamped plainly in the front of appellant's passport.

C. THE PASSPORT ACT DOES NOT INVOLVE AN INVALID DELEGATION OF POWER BY CONGRESS TO THE EXECUTIVE BRANCH

Finally, appellant challenges the Passport Act on the ground that it does not provide sufficiently definite standards for the Secretary of State to follow in formulating travel controls.[18] As this Court frequently has recognized, however, Congress may lawfully give the President broader discretion in handling foreign affairs than in domestic affairs. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109–110. Congressional legislation

[18] To the extent that the Executive's authority to restrict travel rests upon the inherent power of the President over foreign affairs (see pp. 38–41 *supra*), this contention is of course inapplicable.

"within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320. Indeed, it would be almost impossible for Congress to attempt to specify in advance the factors that the Executive is to consider in making the delicate determination whether, in what circumstances and to what countries, foreign travel should be restricted. Congress thus wisely left it to the Secretary of State to be guided by broad considerations of foreign policy in deciding whether to permit travel to particular areas, and it was on the basis of those considerations that the Secretary determined to impose a general ban on travel to Cuba.

While the Passport Act itself does not provide any specific standards for the Secretary, the statute that makes it a crime to leave or enter the country without a valid passport (8 U.S.C. 1185), does provide standards for its applicability. That Section becomes operative only after the President has proclaimed a national emergency, and then only when "the President shall find that the interests of the United States require that restrictions and prohibitions * * * be imposed upon the departure of persons from and their entry into the United States * * *." The interest of the United States has been held to be a clear enough standard in another context. *American Sumatra T. Corp.* v. *Securities and Exchange Commission*, 110 F. 2d 117, 121 (C.A. D.C.). It is even more clearly appro-

priate here,[19] where problems of foreign relations are involved.

---

[19] Appellant argues (Br. 55–56) that the district court improperly dismissed the action as to the Attorney General. However, the Attorney General was a defendant only because petitioner sought an injunction against criminal enforcement of 8 U.S.C. 1185(c), which makes it a crime to violate statutory and administrative rules relating to passports. This Court has long upheld the rule that equity will not ordinarily enjoin a criminal prosecution. *E.g.*, *In re Sawyer*, 124 U.S. 200, 210–211; *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163–164; *Terrace* v. *Thompson*, 263 U.S. 197, 214; see Hart and Wechsler, *The Federal Courts and the Federal System*, 862–864. The federal courts have repeatedly applied this rule to refuse to enjoin federal officials from prosecuting violations of federal statutes. *E.g.*, *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Ryan* v. *Amazon Petroleum Corp.*, 71 F. 2d 1, 6 (C.A. 5); *Richmond Hosiery Mills* v. *Camp*, 74 F. 2d 200 (C.A. 5); *Sparks* v. *Mellwood Dairy*, 74 F. 2d 695 (C.A. 6); *Board of Trade of Kansas City* v. *Milligan*, 90 F. 2d 855 (C.A. 8). The only exceptions to this traditional rule of equity are where the prosecution will subject the complainant to irreparable injury. *E.g.*, *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 98–100; *Watson* v. *Buck*, 313 U.S. 387, 400–401; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 95–96.

Here, the appellant has not been charged with violating any criminal statute and has apparently not violated any. He is challenging in this litigation the validity of the Department of State's administrative action on statutory and constitutional grounds. If he is successful, he will be able to travel to Cuba without fear of prosecution. Since this civil suit provides a full remedy, the appellant plainly is not faced with irreparable injury unless he can bring an action to enjoin the criminal statute.

For similar reasons, this issue is of no real importance in this case. If the appellant is successful in his suit against the Secretary of State, he is entitled to travel abroad and no prosecution can be brought by the Attorney General. On the other hand, if the appellant does not prevail against the Secretary of State, he is equally not entitled to an injunction against the Attorney General since the criminal statute merely enforces the Secretary's administrative determinations.

CONCLUSION

For the foregoing reasons, we respectfully submit that the cause should be remanded to the district court to allow appellant to appeal to the court of appeals or, alternatively, the judgment of the district court should be affirmed.

ARCHIBALD COX,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
BRUCE J. TERRIS,
Assistants to the Solicitor General.
KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

LEONARD C. MEEKER,
Acting Legal Adviser,
LEE R. MARKS,
Special Assistant to the Legal Adviser,
Department of State.

JANUARY 1965.

APPENDIX

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS

The Act of July 3, 1926, § 1, 44 Stat. 887, 22 U.S.C. 211a, provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insural possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, provides, in pertinent part, as follows:

> TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this

section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

Section 156 of 5 U.S.C. provides as follows:

Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the

department, and he shall conduct the business of the department in such manner as the President shall direct.

Executive Order No. 7856 of 1938, March 31, 1938, 3 Fed. Reg. 681, 22 C.F.R. 51.75–51.77, reads, in pertinent part, as follows:

> § 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.
>
> § 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.
>
> § 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, provides, in pertinent part, as follows:

> A PROCLAMATION
>
> WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, "Control of Persons Leaving or

Entering the United States By the President of the United States," provides, in pertinent part, as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and pub-

licly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney

General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

* * * * *

Section 53.1–53.8 of 22 C.F.R. provide, in pertinent part, as follows:

"Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency

§ 53.1 *Definition of the term "United States".* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided,* That the person is in posses-

sion of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

* * * * * *

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United States, as defined in § 53.1. The fee for granting an exception under this subsection is $25.

* * * * * *

§ 53.5 *Prevention of departure from or entry into the United States.* * * *

§ 53.6 *Attempt of a citizen or national to enter without a valid passport.* * * *

* * * * * *

§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Public Notice 179, 26 Fed. Reg. 492, promulgated on January 16, 1961, provides:

"DEPARTMENT OF STATE
[Public Notice 179]
United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration."

Press Release No. 24, issued by the Secretary of State on January 16, 1961, provides:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being

declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

U.S. GOVERNMENT PRINTING OFFICE:1959